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December 16, 2002

By UPS overnight mail

Vernon A. Williams, Secretary
Surface Transportation Board
Case Control Unit, Suite 713
1925 K Street, N.W.
Washington, DC 20423-0001

Re: STB Finance Docket No. 34236, *Bolen-Brunson-Bell Lumber Company, Inc. v. CSX Transportation, Inc.*

Dear Mr. Williams:

Enclosed please find an original and 10 copies of Complainant's Rebuttal, for filing with the Board in the above referenced matter.

Kindly acknowledge receipt by date stamping the enclosed duplicate copy of this letter and return in the self-addressed stamped envelope.

Very truly yours,

Tom McFarland

Thomas F. McFarland
Attorney for Bolen-Brunson-Bell
Lumber Company, Inc.

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206873

BEFORE THE
SURFACE TRANSPORTATION BOARD



BOLEN-BRUNSON-BELL LUMBER
COMPANY, INC.,

Complainant.

v.

CSX TRANSPORTATION, INC.,

Defendant.

)
)
)
) FINANCE DOCKET
) NO. 34236
)
)
)

COMPLAINANT'S REBUTTAL

BOLEN-BRUNSON-BELL LUMBER COMPANY, INC.
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<i>Complainant,</i>	)	
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	)	NO. 34236
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	)	
<i>Defendant.</i>	)	

COMPLAINANT'S REBUTTAL

Foreword

CSXT's Reply confirms its contempt for the common carrier service obligation, which was already evident from the marathon length of the embargo, now approaching two full years. CSXT contends that it is "not good public policy" to require rail carriers to immediately repair embargoed track (Reply at 17), disregarding decades of judicial authority upholding the common carrier duty to provide transportation. *See* the Court's comprehensive review of the law in *GS Roofing Products Co. v. STB*, 143 F.3d 387, 392-394 (8th Cir. 1998) (*GS* case). ("The common carrier obligation reflects a strong public policy that carriers should not unilaterally cease operations absent exigent circumstances", at 393).

Given CSXT's disdain for the legal principle, it is not surprising that the evidence in its Reply ignores the admonition of the Court in the *GS* case that the standards by which the reasonableness of continuing embargoes is to be determined are to be balanced in the short-term. CSXT's evidence instead is based on rehabilitation of the bridge for long-term operations.

upgrading the bridge to a higher design standard and alleged unprofitability of operating the rail line over the long-term.

CSXT's Reply thus fails to provide either legal or evidentiary support for the reasonableness of the lengthy embargo at issue.

Rebuttal Argument

1. Liability

BBB demonstrates below that none of the evidence or argument in CSXT's Reply provides a valid defense to BBB's complaint for failure to provide rail transportation on reasonable request. Our focus is on the five factors that are to be balanced in determining the reasonableness of a continuing embargo, i.e. (*GS* case, 143 F.3d at 392):

- (1) the cost to repair the railroad;
- (2) the intent of the railroad;
- (3) the length of the embargo
- (4) the amount of traffic on the line; and
- (5) the financial condition of the carrier.

A. Cost to Repair the Railroad

(i) The Evidentiary Standard

The evidentiary standard here is "minor interim repairs" to permit short-term resumption of rail service while longer-term options are pursued, such as abandonment, line sale, or rehabilitation. *GS* case, 143 F.3d at 394 ("Arkansas Midland could have made minor interim repairs that would have allowed the line to operate as it had . . . In the meantime, the railroad was free to explore its long-term options, including the possibility of selling the line, pursuing

abandonment proceedings, or raising funds for a rehabilitation project"). The question is what will it cost to put the rail line back in service for a limited time until it can be abandoned, sold or rehabilitated.

That standard is in sharp contrast to rehabilitation for long-term operations or upgrading to a higher safety standard, as may be proper considerations in abandonment cases. *GS* case, 143 F.3d at 393-394 ("(N)otions of long-term feasibility have no place in a proceeding to determine the reasonableness of an embargo . . . (A) railroad should not be permitted to refuse to resume service simply because extensive improvements might be necessary for the long-term success of the line").

(ii) **CSXT's Evidence**

The \$214,500 cost of repairs set forth in CSXT's Reply is identical in both composition and total to the cost of repairs that CSXT put forth in the abandonment case (*compare* Reply at 32-34 with *id.* at 41-42). CSXT argues that its consistency in that respect should cause the Board to favor its cost of repairs over BBB's, which differs significantly in the complaint and abandonment cases (Reply at 11-12). In truth, however, that consistency dooms CSXT's evidence in the case at hand because, as shown above, the standards for cost of repairs are materially different in embargo and abandonment cases. As shown below, CSXT's cost of repairs in both instances is based on rehabilitation for long-term operations and upgrading to a superior design standard. That may be proper in an abandonment context, but not in a complaint involving the reasonableness of a continuing embargo.

It is beyond dispute that CSXT's cost of repairs is for rehabilitation for long-term operations. CSXT left no doubt about that when it said (Reply at 46):

... To avoid the need to make frequent repairs, CSXT would repair the Bridge so that it would be functional for ten years without the need to perform further periodic work. Therefore, our estimate of costs includes all costs necessary to be spent to put the Bridge back into service for ten years . . .

See, also, Reply at 32. Rehabilitation for ten years of service is not minor interim repairs to permit short-term operations while longer term options are pursued. It obviously does not take anywhere near ten years to abandon a rail line, or sell it, or raise funds to rehabilitate it.

Indeed, CSXT's cost is for complete replacement of all bridge components except pilings -- replacement of all 11 caps, all 84 stringers, all 15 curbs, all 120 feet of flooring and every piece of bracing (Reply at 41). CSXT acknowledges that the newly-replaced bridge components would last for 40 to 50 years (*id.* at 46). Replacement of virtually all bridge components for 40 to 50 years of operation is undeniably long-term rehabilitation, not minor interim repairs.

Even more proof is provided by the fact that CSXT's cost of repairs admittedly includes costs to replace non-defective bridge components on the theory that it would be more cost-effective to replace those components at the same time that defective components are being replaced. CSXT's inspection identified only 36 of the 84 stringers in the bridge as "rejects" that should be replaced (Reply at 48). However, CSXT included costs to replace the other 48 non-defective stringers as more cost-effective to replace now than 10 years in the future (*id.*). On its face, that manner of costing is not reconcilable with the standard of minor interim repairs for short-term operations. Replacement of non-defective bridge components clearly is not required for restoration of short-term rail operations.

CSXT also relies on a repair cost estimate of \$265,000 by Osmose, Inc. (Reply at 66). But those repairs are designed to last "for 10 years or 20 years" (*id.*). That is clearly long-term rehabilitation.

CSXT's cost of repairs also inappropriately includes costs for upgrading the bridge to meet a higher design standard (Reply at 47-48). Whereas the bridge had 84 stringers before the embargo, CSXT's cost of repairs is based on upgrading the bridge to a total of 120 stringers (*id.* at 48). In the *GS* case, the Court held that it was legally erroneous to predicate the cost of repairs in an embargo case on the cost to upgrade track to comply with a higher safety standard. (143 F.3d at 393). The same is true here regarding CSXT's upgrading of this bridge.

CSXT's repairs are based on long-term efficiency and cost-effectiveness, not on minimal repairs for restoration of short-term operations. Thus, CSXT's witness contends that the long-term repairs that he recommends would avoid continuing costs for inspections of the bridge after each train movement and for mobilization of equipment and employees to perform patch repairs on the bridge. (Reply at 34-35). Regardless of whether that contention is accurate, it misses the obvious point that any such inspection and maintenance costs would be temporary -- to be incurred only until CSXT abandoned the line, or sold it, or rehabilitated it. Therefore, CSXT's testimony on this point also confirms that its cost of repairs is based on the improper standard of long-term rehabilitation.

Based on considerations of efficiency and cost-effectiveness, CSXT contends that the repairs in its evidence for long-term bridge rehabilitation are superior to the interim repairs advocated by BBB, which CSXT characterizes as a "patch-job" that would create a need for

constant inspection and maintenance in the future. (Reply at 32). However, that argument was specifically rejected in the *GS* case, viz. (143 F.3d at 393-394):

The Board found that the minor repairs made by Caddo Antoine represented a "band aid" approach that did not address the rehabilitation of the line. See Decision at 12. The Board held that because rehabilitation was essential to the long-term success of the Norman Branch, Arkansas Midland cannot be required to make the minor repairs that would keep the track in present operation. See *id.* The Board's preoccupation with the long term profitability of the Norman Branch is misplaced, however, for notions of long-term feasibility have no place in a proceeding to determine the reasonableness of an embargo. An embargo becomes unreasonable if a railroad is physically and financially able to resume services. See *Chicago, Rock Island, & Pacific*, 501 F.2d at 911; *Ethan Allen*, 431 F. Supp. at 743; *Baltimore & Annapolis*, 398 F. Supp. at 463. This is true regardless of the long-term prospects of a particular line. If service can be resumed at safe levels without substantial expenditures of time or money, a railroad should not be permitted to refuse to resume service simply because extensive improvements might be necessary for the long-term success of the line.

By virtue of citation of that principle of the *GS* case at page 12 of BBB's Opening Statement, CSXT was well aware that the cost-of-repair standard in embargo cases is minor interim repairs rather than rehabilitation and/or upgrading for long-term operations. The evidence in CSXT's Reply was thus presented in conscious disregard of that principle. Indeed, the cost of repairs put forth by CSXT is so patently excessive in relation to the cost for minor interim repairs as to undermine CSXT's credibility in all aspects of this proceeding.

For all of the foregoing reasons, the evidence on cost of repairs in CSXT's Reply is not entitled to any weight in determining the reasonableness of the embargo in this proceeding.

(iii) CSXT's Criticism of BBB's Evidence

Ironically, in criticizing BBB's evidence, CSXT is forced to attempt to undermine its own bridge inspection reports inasmuch as the June, 2002 CSXT bridge inspection report is the evidentiary basis for BBB's cost of repair. In that respect, too, CSXT is entirely lacking in

credibility. Whereas the bridge inspection reports constitute contemporary objective evidence of bridge conditions and need for repairs, the criticism of those reports in CSXT's Reply is self-serving, is submitted long after the fact, and is entirely unsupported.

CSXT's June, 2002 bridge inspection report identified the condition of two bents in the bridge as "critical" and the condition of the other eight bents in the bridge as "bad". (BBB Opening Statement at 40, 50-51; CSXT Reply at 54-64). In its Response to Discovery in this proceeding, CSXT stated that "critical" means "a defective condition requiring immediate repair or removal from service for safe operation of rail traffic," and that "bad" means "defective". (BBB Opening Statement at 40). Thus, the plain meaning of the June, 2002 bridge inspection report is that there are conditions in two bents (Nos. 3 and 4) that are so defective that they require immediate repair or removal from service for safe operation of rail traffic, while there are conditions in the other eight bents that are defective, but not to the degree that they require immediate repair or removal from service for safe rail operations. The critical conditions in those two bents constitute the minor interim repairs necessary to restore short-term rail operations. If all defective conditions in those two critical bents were to be repaired, the cost would be \$17,753 (*id.* at 42-43).

CSXT's attempt to undermine its own June, 2002 bridge inspection report not only is unsuccessful, but also further damages its credibility. Thus, CSXT's witness now states that "I am not willing to take the responsibility to have only the two bents reported in January of 2001 as critical repaired, when I have made a later more in depth inspection and determined that more of the Bridge needs to be repaired just to be operated safely." (Reply at 30).

It is readily apparent that the CSXT witness has the facts wrong. The two bents were identified as critical in the June, 2002 bridge inspection report, not in the January, 2001 report. The alleged inspection made by that witness in February, 2001 (Reply at 29) thus could not have been a "later" inspection.

Moreover, there is no evidence of any kind to support the CSXT witness's contention that he made a "more in depth" inspection than the inspections that are documented by detailed reports in this record. The alleged inspection performed by the CSXT witness in February, 2001 is entirely undocumented as to either methodology or findings.

Indeed, there is good reason to doubt that any such February, 2001 inspection occurred. The CSXT witness says that such inspection occurred after concern over the condition of the bridge was expressed to him by an Assistant Regional Engineer, who had inspected the bridge on or about January 9, 2001. (Reply at 28-29). The inference is that the February, 2001 inspection was necessary because the CSXT witness had not inspected the bridge prior to that time. But that is not true. The CSXT witness acknowledged that he accompanied the Assistant Regional Engineer on the January 9, 2001 inspection. (See that witness's testimony on that subject, copy of which is attached to this Rebuttal as Appendix 1 at 1). That being the case, there was no reason for a duplicative inspection in the next month.^{1/}

The sum and substance of the foregoing is that the defective conditions in Bents 3 and 4 identified as critical in the June, 2002 CSXT bridge inspection report constitute the best evidence of minor interim repairs needed to restore the rail line to service on a short-term basis. That is

^{1/} The CSXT witness apparently feels the need to refer to a later inspection because the January, 2001 bridge inspection report did not identify conditions that warranted an embargo of rail service.

the only documented evidence in this record of defective bridge conditions that require "immediate repair or removal from service for safe operation of rail traffic". That is CSXT's own evidence. It has not been undermined in CSXT's Reply.

(iv) **Time To Complete Repairs**

The complete answer to CSXT's evidence on time to complete repairs is that it is not entitled to any weight because it is based on the excessive bridge rehabilitation and upgrading argued for by CSXT, rather than on minor interim repairs under the proper evidentiary standard.

But CSXT's position is entirely lacking in credibility even if it were based on the appropriate evidentiary standard. To begin with, CSXT's evidence and argument on this subject are inconsistent with each other. CSXT's witness estimated 9 to 12 months to complete repairs, composed of 6 months to receive materials and 3 to 6 months for work on the bridge. (Reply at 36). In argument, CSXT claims that it will take 15 to 18 months to complete repairs, composed of 12 months to schedule repairs (inclusive of 6 months to receive materials) and 3 to 6 months for work on the bridge. (*Id.* at 14-15). CSXT makes no attempt to explain the difference.

More fundamentally, CSXT's position is contradicted by its testimony in the prior related abandonment case. The same CSXT witness testified in that case that it would take a total of 3 to 6 months to complete the same repairs on the same bridge plus much more extensive repairs on another much longer bridge. (Appdx.1 hereto at 1-2). That other bridge is 1,792 feet long, almost 15 times longer than the bridge here at issue. (*Id.* at 2). There is no credibility in CSXT's contention that it would take 9 to 12 months to complete repairs on 120 feet of bridge when CSXT is on record that it would take less than half that time to complete more extensive repairs on bridges having more than 15 times that length.

Based on the proper evidentiary standard of minor interim repairs, it would have taken no longer than a few days to complete repairs on Bent Nos. 3 and 4 of the bridge, consisting of posting 9 pilings and replacing 2 caps, including time to obtain required materials. (Reply VS Stone, attached hereto as Appendix 2). The embargo thus ceased to be a valid defense to CSXT's failure to provide rail transportation as of that time.

(v) **Requested Finding on Cost and Time for Repairs**

For all of the foregoing reasons, the Board is requested to find that it would have cost no more than \$17,753 to make minor interim repairs to restore the rail line to service pending its abandonment, sale or rehabilitation, and that it would have taken no more than a few days to complete those minor repairs.

B. The Intent of the Railroad

CSXT has admitted that it intended to terminate rail service over the line permanently by means of the embargo. (Reply at 18, "BBB is generally correct that CSXT intended to terminate rail service over the Memphis Line once it was embargoed").

CSXT's admission in that respect is a very strong indication that its embargo is unreasonable. "(A)n intent quickly to restore service would support a legitimate embargo, while evidence that the embargo was lengthy and the carrier showed no intent to restore service in a reasonable time would favor a finding that the embargo had become an unlawful abandonment." *Overbrook Farmers Union -- Petition for Declar. Order*, 5 I.C.C.2d 318 (1989) at 323, note 15.

CSXT has argued that the Board has "ratified" CSXT's decision not to restore rail service by granting CSXT's application for authority to discontinue service over the line. (Reply at 18). As the Board well knows, the decision in the discontinuance proceeding is not a ratification of

CSXT's embargo in any respect. The decision in the discontinuance proceeding relates only to the service obligation in the future. It has nothing to do with whether CSXT violated its service obligation during any period in the past.

CSXT argues that throughout the course of the embargo it was pursuing long-term options such as abandonment, line sale and shipper relocation, as if that activity somehow softens the effect of its intent to unilaterally terminate service permanently through the embargo. It does not have that effect. "The filing of or pendency of an abandonment application neither freezes or legalizes a long drawn out embargo which has been transmuted into an unlawful abandonment" *ICC v. Maine Central Railroad Company*, 505 F.2d 590, 585 (D., Vt., 1977). "(T)he mere search for a substitute rail operator offers no solace to (the shipper), nor does it meet (the carrier's) common carrier obligation." *Louisiana Railcar, Inc. v. Missouri Pacific Railroad Co.*, 5 I.C.C.2d 542, 547 (1989). A rail carrier has a duty either to provide rail service or to make a shipper whole through substituted service. *Overbrook Farmers Union - Petition for Declar. Order, supra*, 5 I.C.C.2d at 326.

C. Length of Embargo

In what surely must be one of the most bizarre arguments ever made on this subject, CSXT attempts to blame the marathon length of this embargo on the protest filed by BBB that caused the Board to deny CSXT's petition for exemption of abandonment. If the abandonment had been granted at that earlier date -- so the argument proceeds -- it would not have been necessary for CSXT to extend the embargo while it once again sought abandonment relief. (Reply at 19).

The non sequitur of that argument is readily apparent. BBB's protest is no more responsible for continuation of the embargo than CSXT's failure to provide sufficient support for the petition for exemption, which was the ground for denial of that petition. The sole cause for the extended duration of this embargo has been CSXT's stubborn insistence on terminating service permanently through embargo without regard to its common carrier service obligation, and in derogation of the Board's abandonment process.

D. Amount of Traffic

CSXT's contentions that BBB has not proven that it will use the rail line to the same extent as in the forecast year (Reply at 15-16) and that service to BBB would be unprofitable (*id.* at 16) are arguments for abandonment or discontinuance proceedings, not for this unlawful embargo case. *GS* case, 143 F.3d at 394. ("An embargo may not be justified solely on the grounds that to continue to provide service would be inconvenient or less profitable."). Consequently, BBB will not burden the Board with responses to those irrelevant arguments. BBB's silence should not be taken as agreement with CSXT's position.

BBB's burden on the amount-of-traffic criterion is only to show the likelihood of some traffic, so that the cost for any minor interim repairs to restore service would not be a patent economic waste. BBB unquestionably has done so by virtue of its proof of consistent significant use of this rail line in the past.

E. Financial Condition of the Carrier

CSXT acknowledges that it earned net railway operating income of more than \$456 million in 2001. (Reply at 17). The cost of repair of the bridge is a pittance in comparison. Without question, CSXT has the financial ability to make the required repairs.

F. Requests for Rail Transportation

CSXT contends that BBB never requested rail service. (Reply at 15). That is not true.

From the beginning of the embargo and on a continuing basis, BBB made CSXT aware that BBB desired and intended to continue to ship by rail over the line. BBB specifically requested that CSXT remove the embargo and restore rail service. Those contacts were made by Mr. Noonan E. Greene of BBB to Mr. Bill Provident, CSXT's Director of Product Performance, and later to Mr. Mike Katula of CSXT. (BBB Opening Statement at 65). CSXT has not provided statements by Mr. Provident or Mr. Katula denying that those contacts were made.

Where rail service has been embargoed, those expressions of desire and intent to use the rail line and requests for reinstitution of rail service are tantamount to specific requests for rail transportation. *Overbrook Farmers Union - Petition for Declar. Order, supra*, 5 I.C.C.2d at 325. Where, as here, a rail carrier has repudiated a customer's right to rail transportation by embargoing a rail line, the customer is absolved from making repeated futile requests for service. *Montgomery Ward & Co. v. Northern Pac. Term. Co.*, 128 F.Supp. 475, 502 n. 47 (D., Ore., 1953). That principle applies whether the customer is a shipper or receiver of rail shipments.

G. Requested Finding re Liability

As set forth in the previous pages, individual consideration of each of the factors to be balanced points strongly toward a finding of unreasonable embargo and resulting violation of 49 U.S.C. § 11101(a). Collective consideration of those factors compels that finding. The Board is respectfully requested to so find.

2. Damages

A. CSXT's Argument

CSXT presents no evidence whatsoever and very little argument on the issue of damages. (Reply at 20-22). The limited argument that it makes is shallow and scattergun.

First, CSXT resurrects the claim that BBB did not request rail service. (Reply at 20). That claim goes to liability, and was fully refuted in the previous section of this Rebuttal (at 16).

Second, CSXT argues that BBB has alternate truck and rail-truck service available (Reply at 20), but CSXT does not address the relative cost of those alternatives. The presence of alternative transportation would have some relevance in abandonment or discontinuance proceedings, but it has no relevance on the issue of damages for violation of § 11101(a) without information on cost of transportation.

Next, CSXT argues that the damage period should not begin to run until September 1, 2002, approximately 9 months after the Board's denial of its petition for exemption of abandonment of the line. (Reply at 20). That argument is based on CSXT's evidence on time to repair the bridge, which has been thoroughly discredited in a previous section of this Rebuttal (at 12-13), and on CSXT's patently erroneous contention that it had no duty to take any steps to repair the bridge until after its petition for exemption of abandonment was denied. "The filing of or pendency of an abandonment neither freezes nor legalizes a long drawn out embargo which has been transmuted into an unlawful abandonment." *ICC v. Maine Central Railroad Company*, *supra*, 505 F.2d at 595.

CSXT's claim that BBB's lost income of \$500 per carload from its reloading business is gross income rather than net (Reply at 21) disregards detailed testimony provided by BBB

Witness Bell that the \$500-per-carload revenue corresponds to BBB's net income on that business. (BBB Opening Statement at 63-64; *see, also, id.* at 21, 34). The gross amount received and the net profit were essentially the same because BBB's customers were paying for the economy of receiving shipments at a nearby location by rail rather than for physical services rendered by BBB, and because except for minimal fuel costs for forklifts, there were no costs that were attributable to BBB's reload operation (*id.*). That evidence stands un rebutted.

CSXT's claim that BBB's customers can readily find reload services other than BBB's (Reply at 21) supports BBB's claim for damages. That is precisely what has happened because of the embargo. BBB's former customers have used other reload facilities, with the result that BBB has lost the substantial profits that were associated with that business.

CSXT is way off base in arguing that BBB failed to mitigate damages when it refused CSXT's request to pay part of the costs that would be involved in relocating its business from Bellwood Reload to CSXT's Leewood Yard. (Reply at 21-22). BBB was entitled to rail service at Bellwood Reload or to be made whole by means of substitute rail service at another location. *Overbrook Farmers Union - Petition for Declar. Order, supra*, 5 I.C.C.2d at 326. BBB would not be made whole if it were made to pay some or all of the costs to relocate its business because of CSXT's refusal to provide rail service at Bellwood Reload. It is not reasonable to expect a party to take steps to avoid loss if those steps may cause other loss. *Louisiana Railcar, Inc. v. Missouri Pacific Railroad Co., supra*, 7 I.C.C.2d at 34.

B. Requested Finding re Damages

The Board is requested to find that BBB has suffered damages as a result of CSXT's failure and refusal to provide requested rail transportation at Bellwood Reload since March, 2001 in the form of lost profits on its reload business and added charges paid and borne on traffic for

its own account; that BBB has reasonably quantified those damages in the amount of \$153,106 as of September 30, 2002; that such damages are continuing; that BBB has reasonably mitigated damages; that it will be necessary at a future time to make a final determination of damages; and that interest should be awarded on all damages at the rate and compounding terms provided for in 49 C.F.R. § 1141.1.

Respectfully submitted,

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Complainant

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Attorney for Complainant

DATE FILED: December 17, 2002

VERIFIED STATEMENT
OF
LEEROY DAVIDSON

My name is LeeRoy Davidson and I am Regional Engineer of Structures for CSX Transportation, Inc. ("CSXT"), with offices located at 11429 Bluegrass Parkway, Louisville, Kentucky. My duties include inspection, repair and replacement of all railroad structures on the Midwest Region. I began my railroad career in 1970 as a bridge repairman, and was promoted to Assistant Bridge Supervisor in 1972 and Bridge Supervisor in 1980 for the former Louisville and Nashville Railroad Company. Since 1981, I have been employed by CSXT as Assistant Bridge Supervisor, Bridge Supervisor, General Bridge Supervisor, Engineer B&B, Engineer of Production, Assistant Division Engineer and Regional Engineer of Structures.

One purpose of this statement is to describe the present condition of seven mainly timber railroad bridges on a thirteen mile segment of the Cordova Branch from Milepost ONI 211.0 to ONI 224.0 near Memphis, Tennessee, in the Midwest Region, Nashville Division. This statement also details the relevant repair and replacement costs for each of the seven bridges.

The line was embargoed on March 1, 2001, because the first two bridges (located at mileposts ONI 223.3 and ONI 218.5) are unsafe to operate over any longer absent significant repairs. The estimated time to repair the two bridges to a safe level is approximately three to six months.

In January, 2001, I personally inspected each of the seven bridges along with a CSXT Bridge Supervisor and a CSXT Assistant Regional Engineer Bridges. The bridges were inspected by following the industry standards for bridge inspections as well as the standards outlined in CSXT Fundamentals of Railroad Bridge Inspection (attached as Exhibit A). The techniques employed in the inspection of the bridges included the Pick Test, visual inspection, sounding and drilling. (See Exhibit A for detailed explanations of these techniques.)

A typical timber railroad bridge has a life span of approximately 40 to 50 years depending on the rate of decay, the quality of the timber used and the quality of the preservative treatment, among other factors. When the cost of repairing a bridge is so great that it is not economically feasible to maintain and it becomes unsafe to operate on the bridge, the life of that bridge is considered to have ended.

After the inspection utilizing the industry standards, the above-mentioned techniques and my general engineering knowledge, I determined that the first two bridges are unsafe to operate over without significant repairs and that the other five bridges are greatly deteriorated and will require extensive repairs in the near future to maintain a safe operating condition for five years. Even if CSXT were to make the recommended repairs to the bridges, the bridges would still require replacement within approximately ten years because the bridges have effectively reached or surpassed their useful lives.

Listed below by location are the seven bridges with a description of each bridge as well as the cost of repair and reconstruction for each.

Bridge #1 is located at Milepost ONI 223.3 on the line proposed for abandonment in this proceeding. The bridge was built in 1921 and measures approximately 120 linear feet. It is a 6-pile, creosote pine timber trestle bridge. This bridge has sustained major fire damage as a result of arson. The decay level of the bridge is approximately 80% in terms of pilings, stringers, flooring, and curbs with several pilings and stringers failing. I estimate the repair cost to be approximately \$214,500.00. This estimate includes the cost to post 28 pilings, replace 11 caps, 120 stringers, and all flooring and curbs. The cost to rebuild this bridge is estimated to be \$360,000.00. (Timber Bridge Inspection Report dated January 9, 2001 for Bridge #1 is attached hereto as Exhibit B.)

Bridge #2 is located at Milepost ONI 218.5 on the line proposed for abandonment in this proceeding. The bridge measures approximately 1792 linear feet. It consists of approximately 1615 linear feet of creosote pine timber trestle on driven 6-pile bents and approximately 177 linear feet of steel open deck plate girders on concrete piers. In order to repair the bridge, CSXT would be required, at a minimum, to replace 160 bridge ties, post 158 pilings, and replace 30 caps. The cost of performing these repairs is estimated to be \$485,000.00. The cost to rebuild this bridge is approximately \$4,446,000.00 in large part due to the length of the bridge. (Timber Bridge Inspection Report dated January 9, 2001 for Bridge #2 is attached hereto as Exhibit C.)

Bridge #3 is located at Milepost ONI 218.4 on the line proposed for abandonment in this proceeding. The floor of the bridge was built in 1919 and bents were added in 1936. This bridge measures approximately 180 linear feet. It is a creosote pine timber trestle. The pilings are 50% to 70% decayed. The caps, stringers, and flooring are 80% decayed. I estimate the cost to post 14 pilings and replace 3 caps to be approximately \$38,000.00. The cost to rebuild the bridge is

approximately \$540,000.00. (Timber Bridge Inspection Report dated January 9, 2001 for Bridge #3 is attached hereto as Exhibit D.)

Bridge #4 is located at Milepost ONI 218.3 on the line proposed for abandonment in this proceeding. The bridge was built in 1953 and measures approximately 248 linear feet. It is a 6-pile creosote pine timber trestle. The pilings, caps, stringers and flooring are 30% to 40% decayed. I estimate the repair cost to post 40 pilings and replace 10 caps to be approximately \$115,000.00. The cost to rebuild the bridge is estimated to be \$756,000.00. (Timber Bridge Inspection Report dated January 9, 2001 for Bridge #4 is attached hereto as Exhibit E.)

Bridge #5 is located at Milepost ONI 218.1 on the line proposed for abandonment in this proceeding. The bridge was built in 1952 and measures approximately 192 linear feet. It is a 6-pile creosote pine timber trestle. The pilings, caps, stringers, flooring and curbs are 30% to 40% decayed. I estimate the repair cost to post 12 pilings and replace 6 caps to be approximately \$45,000.00. The cost to rebuild the bridge is estimated to be \$576,000.00. (Timber Bridge Inspection Report dated January 9, 2001 for Bridge #5 is attached hereto as Exhibit F.)

Bridge #6 is located at Milepost ONI 214.9 on the line proposed for abandonment in this proceeding. The bridge was built in 1930 and measures approximately 72 linear feet. It is a 6-pile creosote pine timber trestle. The pilings are 60% to 70% decayed and the caps, stringers, flooring, and curbs are 90% to 100% decayed. I estimate the repair cost to post 22 pilings, replace all caps, stringers, flooring, and curbs to be approximately \$108,000.00. The cost to rebuild the bridge is estimated to be \$216,000.00. (Timber Bridge Inspection Report dated January 9, 2001 for Bridge #6 is attached hereto as Exhibit G.)

Bridge #7 is located at Milepost ONI 211.0 on the line proposed for abandonment in this proceeding. The bridge was built in 1924 and measures approximately 49 linear feet. It is a 6-pile creosote pine timber trestle. The pilings, stringers, caps, and flooring are 60% to 70% decayed. Additionally, the north end of this bridge has been washed out by heavy rains. I estimate the repair cost to post 15 pilings, replace 5 caps, replace 50% of flooring and 100 linear feet of curb to be approximately \$90,000.00. The cost to rebuild the bridge is estimated to be \$147,000.00. (Timber Bridge Inspection Report dated January 9, 2001 for Bridge #7 is attached hereto as Exhibit H.)

The total replacement cost for the seven bridges is estimated to be \$7,041,000.00. This estimate includes only the cost to replace the bridges and does not contemplate any allowance for

maintenance and repair to the track along the relevant line. Although CSXT could perform approximately \$1,095,500.00 worth of work to the bridges in order to return them to service, and could probably continue to utilize the bridges through 2006, CSXT does not believe this to be the most prudent course of action. These bridges have outlived their useful lives and will require replacement very shortly. Even if CSXT were to spend \$1,095,500.00 over the next several years on these bridges, such expenditures would in no way alleviate the need to replace the bridges in the near future.

VERIFICATION

COMMONWEALTH OF KENTUCKY)
) SS:
COUNTY OF Hardin)

LEEROY DAVIDSON, being duly sworn, deposes and says that he has read the foregoing statement, knows the contents thereof, and that the statements contained therein are true and correct to the best of his knowledge, information and belief.

Leeroy Davidson
LEEROY DAVIDSON

Subscribed and sworn to before me this
20 day of August, 2001.

Donald R. Richardson
Notary Public

My Commission Expires: April 18, 2005

(SEAL)

REBUTTAL VERIFIED STATEMENT OF HARVEY H. STONE

My name is Harvey H. Stone. I have previously submitted a verified statement in this proceeding in which my background and qualifications were provided.

My rebuttal is responsive to the portion of the verified statement of Leeroy Davidson in which he testifies that it would take 6 months to receive materials for repair of the bridge after they were ordered.

Mr. Davidson's testimony relates to the time to receive the extensive quantity of materials that he contends are required to replace all components of the bridge except for pilings. As I have testified, however, according to CSXT's own bridge inspection report of June, 2002, the most that could be required for interim repair of the bridge is posting of nine pilings and replacement of two caps.

As shown by the attached quote by Appalachian Timber Services, Inc., dated December 12, 2002, it would have taken 30 to 45 days from the date of order to receive the materials for those interim repairs. Those materials should have been ordered when CSXT's inspection of the bridge revealed a need for those repairs. CSXT has claimed that an inspection of the bridge on January 9, 2001 led to the embargo. If the materials had been ordered on or shortly after that date, they would have been available for use in repairing the bridge before the embargo was imposed on March 1, 2001.

Appalachian Timber Services, Inc.
525 East Stonewall Street Sutton, WV 26601
(304) 766-7393 (304) 766-3789 Fax
e-mail: rgibson@atstimber.com

To Dan Swanson
Linda
Stone Consulting

CCA

Cresota

December 12, 2002

WE QUOTE AS FOLLOWS;

Lead time to Sutton, WV

Pieces	Size	bf	Specification	Unit Price	Total
9	14"-20ft		<u>Piling Post</u> Lead Time 30-45 Days ARO	\$250.00	\$2,250.00
2	12x13x14'		<u>Pile Cap</u>	\$225.00	\$450.00

\$2,700.00

TERMS 1%15, Net 30 Days

In no event shall we be held liable for any damages should war, strikes, accidents, delay of carrier, or any other contingency beyond our control render us unable with ordinary diligence to secure transportation or materials and labor and at rates used at time of bid or signing contract.

Quoted prices shall not be construed to include any increases in costs incidental to federal and/or state laws.

Shipment at the time herein agreed upon is contingent upon purchaser's financial condition being at all times satisfactory to the vendor

Subject to Acceptance by

ATS, INC

RICK GIBSON

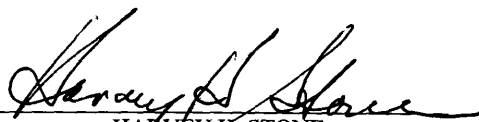
APPENDIX 2 - Complainant's Rebuttal
Finance Docket No. 34236
RVS - Harvey H. Stone
(Page 2 of 3)



VERIFICATION

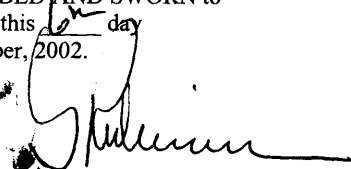
STATE OF PENNSYLVANIA)
) SS:
COUNTY OF WARREN)

HARVEY H. STONE, being duly sworn on oath, deposes and states that he has read the foregoing statement, that he knows the contents thereof, and that the facts therein stated are true and correct.


HARVEY H. STONE

SUBSCRIBED AND SWORN to
before me this 10 day
of December, 2002.




Notary Public

My Commission Expires:

Notarial Seal
Linda G. Robinson, Notary Public
Warren, Warren County
My Commission Expires Apr. 7, 2003
Member, Pennsylvania Association of Notaries

CERTIFICATE OF SERVICE

I hereby certify that on December 16, 2002, I served the foregoing document,
Complainant's Rebuttal, by UPS overnight mail on Louis E. Gitomer, Ball Janik LLP, 1455 F
Street, N.W., Suite 225, Washington, DC 20005; and on Natalie S. Rosenberg, CSX
Transportation, Inc., 500 Water Street, J150, Jacksonville, FL 32202.

Thomas F. McFarland

Thomas F. McFarland